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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 416

C. BOYD CORSA, ET AL.,
Plaintiffs-Appellants,

VS.

JOHN P. TAWES, ET AL.,
Defendants-Appellees,

EDWIN ALLISON, ET AL.,
Intervening Plaintiffs-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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INTRODUCTION

The Plaintiffs-Appellants and Intervening Plaintiffs-Appellants, herein referred to collectively as Appellants, have set forth in their Jurisdictional Statement the basis of this Court's jurisdiction, the questions presented by this appeal, the statement of the facts and history of this case, and references to the opinion of the District Court and to the statutes, the constitutionality of which is here brought in question, as well as the text of that opinion and of those statutes.

The Defendants-Appellees, herein referred to as Appellees, have filed a motion to affirm the judgment of the District Court. Appellants contend that such motion should not be granted because the questions raised in this appeal are of such a substantial nature and involve matters of such general public importance that their decision requires the consideration of this Court. Appellants further contend that the decision of the District Court should be reversed.

ARGUMENT

The questions presented in this appeal are of manifest importance not only to the large and indispensable industry represented by the Appellants, and to the State agencies represented by the Appellees, but also to the consuming public and to the manufacturers and distributors of the many and varied products which are derived solely from the menhaden industry.

It is true, as stated by the Appellees, that the Appellants' fishing operations are carried on along the Atlantic Coast from Montauk Point, Long Island, to Cape Charles, Virginia. However, in considering the extent of the fishing area, it must be borne in mind that menhaden, being migratory fish, are present in any one segment of this area only during certain stages of their annual migrations. Consequently, during a certain portion of the fishing season menhaden are found in abundance only in the ocean waters off the coast of Maryland and the adjacent states. Furthermore, the uncontradicted testimony produced before the District Court is that schools of menhaden must be caught when and where they are sighted. If not so caught, they will likely be lost to commerce.

It is also true that although menhaden are sometimes caught beyond the three-mile limit, as stated by Appellees,

it is impractical to fish for them in waters too distant from the shore because of certain technical aspects of the process of purse netting. Moreover, the testimony before the District Court shows that menhaden are found in greatest abundance within the three-mile maritime belt, or so close thereto that it is impossible, as a practical matter, to determine whether they are within or outside that limit.

It is clear, therefore, that the enforcement of the Maryland statutes would disrupt and possibly destroy Appellants' businesses, which, to exist, must have a daily supply of menhaden. The only reason that such disruption has not already taken place is that the State of Maryland has not, in the past, made any substantial effort to enforce the statutes here in question, insofar as the waters of the ocean are concerned.

The decision of the District Court is palpably incorrect. It has extended the admitted power of the State to enact conservation measures far beyond the recognized constitutional limitations which restrict that power. The power of a state to enact conservation measures flows from and is supported by the state's right to preserve its resources for consumption by its own citizens. See *Geer v. Connecticut*, 161 U.S. 519. When, as in the instant case, it is admitted by the state that neither menhaden nor any fish which feed on menhaden are entirely retained within the state for consumption by its citizens, no justification exists for the complete prohibition by the state of the taking of menhaden. Furthermore, even if Maryland has the power to enact such prohibitions in regard to other resources in order to preserve them for consumption by its citizens, the Court has raised grave doubts as to the applicability of that power to free-swimming fish in ocean waters within the three-mile belt. *Toomer v. Witsell*, 334 U.S. 385, 404. Although it was

not necessary in that case for the Court to resolve those doubts, it may well be necessary for the Court to do so in the present case.

Most important, however, Appellants contend that the reasons given by the District Court in support of the Maryland statutes are not sufficient to justify the deprivation of liberty and property, and the burden upon commerce among the states which are imposed by those statutes.

I.

Section 259(a) Violates the Due Process Clause and Unduly Burdens Interstate Commerce.

The case of *Manchester v. Massachusetts*, 139 U.S. 240, is no obstacle to this Court's reversing the decision of the District Court. In the *Manchester* case the Court gave no consideration to the question of whether or not the statutes there involved violated the due process clause, nor is there any indication that an argument based on violation of that clause was presented to the Court.

Furthermore, the *Manchester* decision has not foreclosed the question of whether or not the statutes involved in this case violate the commerce clause. The *Manchester* decision was based upon the assumption by the Court that, in respect to the regulation of fisheries in Buzzard's Bay, a state statute did not violate the commerce clause unless it conflicted with affirmative legislation enacted by Congress pursuant to the commerce clause. Since then the Court has made it abundantly clear that a state regulation of its fisheries may violate the commerce clause, even where Congress has not acted. In *Toomer v. Witsell*, *supra*, although the Court specifically noted that there were no Federal acts controlling the fisheries involved, it, nevertheless, found that a South Carolina Statute seeking to

regulate those fisheries placed an undue burden upon interstate commerce.

While the Appellants do not dispute the assertion that the preservation of game and fish is generally within the police power of the states, they assert most vigorously that the very decisions cited by the Appellees as affirming this general power make it clear that the exercise of the power is restricted to instances wherein it is reasonable, does not impose arbitrary or unnecessary restrictions upon lawful occupations, and does not unduly impede the flow of commerce. *Geer v. Connecticut*, 161 U.S. 519; *Lawton v. Steele*, 152 U.S. 133, 137; *Lacoste v. Department of Conservation*, 263 U.S. 545, 552. The facts in the present case, disclosed by the record as a whole, show that the attempted exercise by the State of Maryland of its power to enact conservation measures was unreasonable and arbitrary in the present instance, places a completely unnecessary restriction upon the pursuit of a lawful occupation and hampers and threatens to destroy commerce in menhaden products. In *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, cited by Appellees in their motion to affirm, this Court has stated at pages 191-2 that in cases involving a question of the constitutionality of a state law, it will review the whole record to determine whether the legislative action of the state has the necessary "rational basis". It is submitted that the grounds cited by the Appellees and by the District Court in support of the Maryland statutes do not disclose such "rational basis".

(a) *The protection of commercial sport fishing is no justification for the Maryland statutes.* By asserting this ground as justification for the statutes in question, the Appellees concede that one of Maryland's purposes in enacting and enforcing those statutes is to give special protection to a

private interest group within the State, rather than being for the benefit of the public at large. For the supposed benefit of the financial interests of this special group, the State has prohibited the pursuit of a lawful occupation within its jurisdiction. Uncontradicted testimony before the District Court has shown that the use of purse nets for catching menhaden in the ocean does not, in any way, impede sport fishing. The only evidence introduced by the Appellees was that sport fishermen object to purse netting, but not that those objections are well-founded. However, even if there were some support for the contention that purse netting interferes with sport fishing, it cannot be said that the protection of the sport fishing interests has such real and substantial relation to the health, safety, morals or general welfare of the people of Maryland that legislation designed to give preferential treatment to sport fishermen is justified. Such relation is a prerequisite to the state's interfering with the right to engage in a lawful occupation. *Liggett v. Baldridge*, 278 U.S. 105; see also *H. P. Hood & Sons v. DuMond*, 336 U.S. 525.

It is no objection, as contended by Appellees, to a reversal of the District Court that the Maryland Legislature attempted to repeal the statutes, insofar as they apply to purse netting in the ocean for menhaden. An unconstitutional statute does not become less unconstitutional merely because the Legislature has indicated that it is aware that the prohibitions in such legislation are unnecessary for the conservation of the state's natural resources; nor should the Appellants be deprived of their judicial remedy merely because, as contended by the Appellees, the Legislature might, at some future date, rectify its mistake.

(b) *The difficulty of enforcing the law is no justification for the Maryland statutes.* In *Toomer v. Witsell*, 334 U.S. 385, 406, it was argued that a South Carolina statute which

required shrimp fishermen to dock and unload at South Carolina ports was justified on the grounds that it was required in order to enforce a tax on shrimp. The Court did not accept this argument and stated:

> "The importance of having commerce between the forty-eight states flow unimpeded by local barriers, persuades us that state restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure the enforcement of a valid tax."

It cannot be said that the difficulty of enforcing the Maryland statutes, insofar as other types of fish are concerned, justifies making the restriction apply to menhaden when the result is inimical to the Fourteenth Amendment and the commerce clause.

Furthermore, it has not been shown by any testimony produced before the District Court that there has been even one instance in which Maryland enforcement officers have found that purse nets have been used for catching food fish in Maryland waters. See Transcript of Testimony, Vol. 1, page 131, Vol. 2, page 331, and letter of Alexander Harvey, II, Esq., to the District Court Judges dated March 7, 1957, which by stipulation of the parties is part of the record in this appeal.

(c.) *The use of menhaden as food for other fish does not justify the complete prohibition of the taking of menhaden in Maryland waters.* There is no dispute about the fact that menhaden constitute a food supply for some game fish. However, the record indicates that menhaden are not the most important source of such food. Moreover, the testimony of scientific experts produced before the District Court was most definite that the supply of menhaden is almost inexhaustible and that it is inconceivable that the

Appellants' fishing for them could have any effect upon their supply.

(d) *There is no evidence that the Maryland statutes were designed to prevent the exhaustion of the supply of menhaden or that their effect will be to prevent such exhaustion.* As stated by the Appellees, witnesses produced before the District Court having knowledge of marine biology and oceanography, testified that the supply of menhaden is at present almost inexhaustible. Although those witnesses stated that there had been minor fluctuations in this supply during some individual years, the general pattern indicates that this almost inexhaustible supply has been increasing, despite an increased fishing effort. These witnesses indicated that from their calculations, fishing for menhaden has actually tended to stimulate rather than hinder this increase. They further stated, without contradiction, that it is inconceivable that the prohibitions enacted by the State of Maryland could have any connection with the supply of menhaden in the ocean off the coast of Maryland.

II.

The Constitutionality of Section 258 Must Be Determined in This Case.

For the reasons set forth in their jurisdictional statement, the Appellants contend that Section 258 of Article 66(c) of the Maryland Code is unconstitutional. If Section 259(a) is found by this Court to be unconstitutional, it is submitted that the question of the constitutionality of Section 258 must be passed upon to determine the rights of the Appellants (all non-residents of the State of Maryland) to fish with nets in Maryland waters, and to protect the Appellant, Corsa, from criminal prosecution under this

statute. The assurances of the present Maryland officials that they will not enforce Section 258 are not binding upon the successors of those officials and, therefore, such assurances constitute no protection for the Appellants.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the Appellants present a substantial question by this appeal, and that the motion of the Appellees be overruled, and that the decree of the District Court dismissing the Bill of Complaint should be reversed.

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